

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

COMMONWEALTH EDISON COMPANY

Application for a Certificate of Public Convenience and Necessity, pursuant to Section 8-406.1 of the Illinois Public Utilities Act, and an Order pursuant to Section 8-503 of the Illinois Public Utilities Act, to Construct, Operate, and Maintain a new 345 kilovolt transmission line in Ogle, DeKalb, Kane and DuPage Counties, Illinois

Docket 13-0657

**REPLY MEMORANDUM IN SUPPORT OF:
EMERGENCY MOTION TO COMPEL AND/OR BAR EVIDENCE**

Intervenors Ellen Roberts Vogel, Michael Petersdorf, and Sarah Petersdorf (together, “Movants”) Reply to the Response of Wayne, Dean, and Dennis Muirhead, John Cash, Mary Lewis, and Arlene Waterman (the “Owners”), stating:

1. The Owners’ Response misses the mark. Indeed, if anything, it supports Vogel’s and the Petersdorfs’ concern that the Owners are treating these proceedings with a lackadaisical attitude. The Owners’ Response boils down to essentially three defenses: (i) purported responsiveness through nearly 200 pages of document production; (ii) lack of effort by Movants to secure compliance; and (iii) lack of prejudice. All fail.

2. In their response, the Owners assert that they submitted information on January 8, 2015, that “contained the vast majority of the attachments and raw data that ultimately made up the Owner’s final data request response.” Response, p.1. As noted in the Motion, these documents were admitted to have not been reviewed by Owners’ counsel in any manner. Nothing suggests that has changed. With all due respect towards the Owners, as lay persons, they may not understand that submitting 2, 200, or 2,000 pages of maps, tables, and argument could be “specifically tied to each of the fifteen questions,” but not actually answering them. Response, p. 2.

3. Rather than admitting to treating these proceedings with little regard, Owners attempt to turn it around and imply lack of effort on Movants' part to secure Owners' compliance. Response, p. 3 ("the proper mechanism to address that concern would be to contact the Owner's counsel to discuss any clarifications. . . ."). Owners more than misrepresent the extensive efforts of the Movants to secure compliance, efforts that should not have been necessary and would not have been but for Owners' failure to comply with the basic discovery rules. Insofar as the misrepresentations suggest that Movants did not comply with the Rules of Practice and the Supreme Court Rules, the misrepresentation requires rebuttal, which follows:

12/24/14	Data requests issued with multiple telephone calls and voicemails to Attorney Burke's office to ensure they were received in light of holidays.
1/7/15	Attorney Burke first informs counsel for movants that he would not have answers to requests. Several emails exchanged, resulting in a 14-day extension of time for complete responses to requests. Further emails point out that Attorney Burke "verified the statement referencing Exhibit A-4, which is referenced in VOGEL-MG 1.07. As you verified the document, surely you have the ability to confirm that Response."
1/8/15	Attorney Burke forwards well over 150 pages of documents directly from his clients, including his clients' notations, admittedly not reviewing the same. Undersigned informs Attorney Burke that "simply referencing a pile of documents doesn't provide . . . the sort of direction required to comply with the respective subparts, a mere two subparts of fifteen full data requests have been responded to." ¹ Mr. Burke was further informed that undersigned would call to discuss the discovery at 1:00 PM the next day, but "if [he] had a particular time you wish to have me [c]all, I am amenable to trying to fit into your schedule." No response to the email was made.
1/9/15	Undersigned calls Attorney Burke's office at 1:05 PM and is informed he is out of the office. Follow up at 1:11 PM stated that "[b]ecause [Attorney Burke] has indicated [he] has a full schedule, I'll let you choose a time to discuss."
1/14/15	Emails received directly from Mr. John Cash, represented by Attorney Burke. These emails contained the "vast majority" of responses received to date. Attorney Burke informed, via email, that requests were not in the spirit of the extension of time provided by Movants and that due to Attorney Burke's busy schedule and failure to return calls or emails to resolve discovery disputes, undersigned would await his calling to discuss. Thereafter, Movants Counsel and Owners' counsel discuss issues telephonically.
1/16/15	Attorney Burke informed via email that undersigned had began an attempt to create a punch list of all of the defects in the discovery responses, but the deficiencies were so numerous that it was improper to expect Movants to pay their counsel to divine

¹ Email from undersigned to Attorney Burke on January 8, 2015 at 5:02 PM.

	answers from a stack of nearly 200 pages for benefit of Owners. Attorney Burke further informed that: instructions 8, 9, and 13 were completely ignored; that the response to request 1.02 was vague and unresponsive at best; that through review of data requests 1.01 – 1.03, a process that Attorney Burke was informed took an hour of work, there was perhaps 10% compliance and only two subparts of the three data requests reviewed were answered; and that absent full compliance the Motion was going to need to be filed.
1/19/15	Apparently accepting that they had not been complying with requests, Owners provided a series of emails of ex parte communications with the Commerce Commission, apparent members of the Forest Preserve District of Kane County, and ComEd. Attorney Burke states that his clients “have assured [him] that they have now provided all the information in their possession that [Movants] sought.” Ex. A.

As indicated, Movants have tried continuously to obtain compliance. The documents received now barely differ from those of January 8, 2015. Since that time there has been a personal consultation and numerous instances of correspondence, but, Attorney Burke has made himself otherwise unavailable for personal consultation and has been unreasonable in essentially wanting Movants to pay for legal advice to be provided to his clients. It is evident that the Owners are producing documents and their counsel is acting as a courier and, without reviewing, curating, or exerting editorial efforts, is simply passing the argumentative documents on. See, e.g., Ex. A (“After conferring with my clients and expressing your concerns, I attach certain correspondence/communications that my client provided to me Friday and Saturday. They have assured me that they have now provided all of the information in their possession that you sought”). The so-called “proper mechanism” spoken of by Owners has been utilized – and ignored by Owners.

4. Owners assert that it is the duty of Movants to undertake extensive efforts to flush from a large stack of papers answers to questions such as “Please confirm that the ‘1,750 LF of Existing ComEd Property’ shown on Exhibit A-4 of to the Motion for Rehearing is the full extent of ComEd’s existing property rights in the vicinity of the FPDKC Adjustment of which you are aware.”. The referenced Exhibit was part of a Verified document. A “Confirm” or “Deny” should have literally

taken ten seconds. Instead, undersigned scoured the data dump, attempting to ferret out a confirmation or denial. None could be found. It is inappropriate to expect Movants to spend hours scouring nearly 200 pages of information for simple yes/no answers. Further, such scouring will provide little for the purposes of cross-examination. However, through the best, brief, efforts of undersigned – and at the expense of Movants, undersigned’s clients – to ascertain some response out of the Vogel→MG requests, the undersigned has found that the following lack of responses persist:

1.01 (c), (d), (e), (f), (g)	There is no detailed description of properties, uses, distances to residences or structures, how structures are occupied, or other facilities noted on any of the documents provided.
1.02	Despite providing a series of maps with exaggerated, grossly oversized, not to scale, representations of poles, the Owners have not provided studies or analyses they utilized to generate all of their tables, maps, or argument/purported-facts.
1.03 (a), (b), (c), (d), (e), (f)	Simply stating a distance does not explain how that distance was calculated. Here, this common sense deficiency is present for all of the subparts, as there is absolutely no description of the process that generated data.
1.04	The Owners failed to provide copies of any documents, studies, or analyses they utilized when they stated that the FPDKC Adjustment would cost less than the approved route <i>in their Motion for Rehearing</i> . They attempt to rely upon a document that had not been filed when the Motion for Rehearing was filed, i.e., testimony of ComEd witness Naumann. None of the Owners’ numerous argumentative charts, tables, pictures, and maps provide this requested information.
1.07	As discussed above, the extent of knowledge is never confirmed.
1.08	No map, chart, document or table provided confirms or denies that a school will be within 500 feet of the FPDKC adjustment.
1.09	No map, chart, document or table provided confirms or denies that a baseball or softball field will be within 500 feet of the FPDKC adjustment.
1.10	No map, chart, document or table provided confirms or denies that fifteen residential structures will be within 500 feet of the FPDKC adjustment.
1.11	No map, chart, document or table provided confirms or denies that a at least 50 non-residential structures will be within 500 feet of the FPDKC adjustment, let alone any studies, analyses, or other documents supporting such a confirmation or denial.
1.13 (a), (b), (c), (d)	No map, chart, or table provided confirms or denies that the Approved Route has no schools, baseball or softball fields, residential structures, or non-residential structures a school will be within 500 feet, let alone any studies, analyses, or other documents supporting such a confirmation or denial.

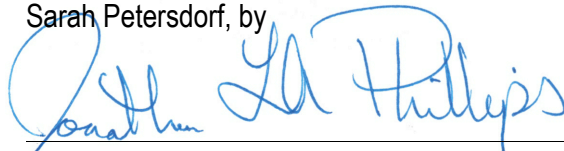
5. Finally, the Owners err in their assertion that, because they will utilize only those documents in the record, the Movants will not be prejudiced. First of all, they have provided many documents that are not in the record. Secondly, at this juncture it appears that the Owners made statements in their Verified Motion for Rehearing that lacked any basis. Finally, as to prejudice, the right to cross-examine the individual members of the Owners is sacrosanct, even in administrative proceedings. See, *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959); *Ill. Commerce Comm'n v. Louisville & Nashville R.R.*, 227 U.S. 88, 93-94 (1913). What the Owners use to support their position is certainly their choice; however, what Movants need in order to show that position to be untenable is not tempered by Owners' choice. Movants are clearly prejudiced through the denial of the ability to cross-examine the Owners. Further prejudice stems from an inability to draft appropriate rebuttal testimony when Movants have no idea how Owners' came up with anything asserted in their testimony.

6. As shown above, and in the original Motion, discovery with Owners has been Kafkaesque. Based upon the Owners' Response, it is clear that the latter relief of barring evidence is the most appropriate of the two remedies.

WHEREFORE, Ellen Roberts Vogel, Michael Petersdorf, and Sarah Petersdorf respectfully request that this Commission provide the relief sought in the Motion.

Respectfully submitted,

Ellen Roberts Vogel, Michael Petersdorf, and
Sarah Petersdorf, by



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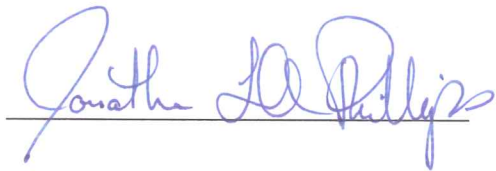
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**VERIFICATION TO:
REPLY IN SUPPORT OF:
EMERGENCY MOTION TO COMPEL AND/OR BAR EVIDENCE**

The undersigned, an attorney, hereby certifies and states:

1. Intervenor Ellen Roberts Vogel, Michael Petersdorf, and Sarah Petersdorf filed their Reply in Support of: Emergency Motion to Compel and/or Bar Evidence. That document contained certain factual averments.
2. Those averments, namely those contained in ¶¶ 3 and 4 are true and correct to the best of undersigned's knowledge.
3. Further, undersigned sayeth naught.



County of Peoria)
)ss
State of Illinois)

Signed and sworn or affirmed before me this 29th day of January, 2015.


Notary Public

<SEAL>





Jonathan Phillips <jphillips@skplawyers.com>

Re: 13-0657 | Discovery Dispute 1 of 4

sburke@foblaw.com <sburke@foblaw.com>

Mon, Jan 19, 2015 at 10:25 AM

To: Jonathan LA Phillips <jphillips@skplawyers.com>

Cc: William Shay <wshay@skplawyers.com>, "adminassistant@skplawyers.com" <adminassistant@skplawyers.com>

Mr. Phillips,

After conferring with my clients and expressing your concerns, I attach certain correspondence/communications that my client provided to me Friday and Saturday. They have assured me that they have now provided all of the information in their possession that you sought.

Stephen Burke

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4 attachments**Letter to Forest Preserve.doc**

82K

**140630 John Cash Email to FPDKC 6.30.14.pdf**

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**141023 John Cash Email to FPDKC 10.23.14.pdf**

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